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CASES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, *Appellants*.

v.

CHARLES F. CLYNE, UNITED STATES Attorney, for the Northern District of Illinois; Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at Chicago, Ill., *Appellees*.

No. 701.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

I.

STATEMENT.

The fundamental question is, Shall the Chicago Board of Trade,[1] or the Congress of the United States under its power to regulate interstate and

[1] The Federal Trade Commission, on Sept. 15, 1920, submitted to the Congress a report entitled "The Grain Trade," made on the request, Feb. 7, 1917, of President Wilson, on the facts relating to production, ownership, manufacture, storage, and distribution of foodstuffs. In the report,

foreign commerce and to establish post-offices and post-roads, regulate the great "current of commerce" flowing between the producing-selling and the pur-

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under the heading "Legal status of future trading" (p. 272), the term "gambling" is defined and described, with the statement that a discussion of the legal status of future trading "involves the consideration, among other questions, of what constitutes gambling." (Vol. V, "Future Trading Operations in Grain," report of Federal Trade Commission on the Grain Trade, Sept. 15, 1920.)

The Supreme Court of Illinois, the inferior Federal courts, and the Supreme Court of the United States have all frequently considered the gambling aspects of future trading.

In *Pickering* v. *Cease*, 79 Ill. 328, 330, the Supreme Court of Illinois said:

> What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, or that any would have been delivered had demand been made. * * * Being in the nature of gambling transactions, the law will tolerate no such contracts.

In *Lyon* v. *Culbertson*, 83 Ill. 33, 38, the Supreme Court of Illinois said:

> The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but, in case of default in keeping margins good, or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions shall be permitted, it must eventually lead to what are called "corners," which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to the trade. A contract, to be thus settled, is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is, in all but name, a gambling on the price of the commodity, and the change of names never changes the quality or nature of things.

In *Pearce* v. *Foot*, 113 Ill. 228, 235, 239, in holding that certain transactions violated section 130 of the Criminal Code which provided that "Whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain or other commodity," shall be subject to a fine or imprisonment, and "all constructs made in violation of this section shall be considered gambling contracts, and shall be void," the Supreme Court of Illinois said:

> Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness.

chasing-consuming markets of the great bulk of substantially the world's supply of wheat, corn, oats, barley, rice, flax, and sorghum?

They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished—to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in "options." The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful "gambling contracts" the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished.

In *Cothran* v. *Ellis*, 125 Ill. 496, 501, the Supreme Court of Illinois said:

But leaving both sections of the statute cited entirely out of view, we are clearly of opinion that dealing in "futures" or "options," as they are commonly called, to be settled according to the fluctuations of the market, is void, by the common law, for, among other reasons, it is contrary to public policy. It is not only contrary to public policy, but it is a crime—a crime against the State, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and pre-eminently the national sin. In its proportions and extent it is immeasurable. In its pernicious and ruinous consequences it is simply appalling. Clothed with respectability, and entrenched behind wealth and power, it submits to no restraint, and defies alike the laws of God and man. With despotic power it levies tribute upon all trades and professions. Its votaries and patrons are recruited from every class of society. Through its instrumentality the laws of supply and demand have been reversed, and the market is ruled by the amount of money its manipulators can bring to bear upon it. These considerations imperatively demand at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse.

In *Schneider* v. *Turner*, 130 Ill. 28, 38, 39, the Supreme Court of Illinois held:

Still it is most earnestly insisted that notwithstanding the instrument sued on is, on its face, an option contract, and although it can not be changed into a mere offer by parol proof, yet it is not violative of section 130, by proper construction of that section. * * *

Preliminarily, the case should be cleared of the fogs which obscure the real issues.

The Grain Futures Act is not a taxing act. Decisions on the taxing power are without application. It is essentially an act to regulate commerce.

The Child Labor cases (*Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax case*, 259 U. S. 20) held that the laws were purely regulatory of produc-

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The first question which suggests itself in considering the construction of this statute contended for by appellants is, if their construction is the true one, Why was the statute enacted at all? Nothing is more clearly and firmly established by the common law than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers, or gambling contracts, and void. (3 Am. and Eng. Ency. of Law, p. 873, and cases cited in note 1; *Cothran* v. *Ellis et al;* 125 Ill. 496.) Long prior to the passage of this statute it had been repeatedly so decided by this court. Therefore the section, as construed by counsel for appellants, serves no purpose whatever. If their construction is correct, when the legislature declared that all contracts made in violation of section 130 should be considered gambling contracts, and void, it only condemned contracts which were already gambling contracts, and void. Certainly more than this was intended.

In *Soby* v. *People*, 134 Ill. 66, 71, 72, the Supreme Court of Illinois said:

> It is manifest that the object of the statute was to suppress and prevent gambling in grain and other commodities; but so great was the difficulty of establishing the unlawful intent of the parties making illegal contracts, and so many were the shifts and devices resorted to for the purpose of concealing the true character of the gambling transactions entered into, that the statute was found to be ineffectual to accomplish the purpose for which it was enacted. It is a matter of common notoriety that, notwithstanding the highly penal character of the statute of 1874, the evil it was aimed at continued to increase with wonderful rapidity throughout the State, and until in almost every city or town of any considerable importance, commission houses, offices, or agencies were established, in which the great bulk of the business transacted was the making of contracts which, while legitimate upon their face, were in fact mere gambling transactions,

tion and never designed to regulate commerce or raise revenue. As child labor was performed before any sale or transportation commenced, it bore no relation to interstate commerce; hence such laws covered subjects of regulation which belonged wholly to the States and could not be sustained under either the taxing clause or the commerce clause. The former Future Trading Tax Act was declared unconstitutional on the authority of *The Child Labor Tax case*,

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which were never allowed to mature, but were uniformly adjusted before maturity upon differences in market price, and without any actual delivery of the articles which were the subject matters of such pretended contracts. To remedy the mischief, the legislature, satisfied of the futility of attempting to suppress gambling in grain and and other commodities by striking merely at the gambling contracts themselves and the parties entering into such contracts, has sought, by the statute of 1887, to suppress all bucket shops, offices, stores, or other places wherein gambling in grain or other commodities is conducted or permitted.

In *Weare Commission Co.* v. *People*, 209 Ill. 528, 542, the Supreme Court of Illinois said:

> Under the testimony in this case, it is conclusively shown that plaintiff in error kept an office in Princeton, where these illegal purchases or operations of gambling in grain were carried on. Plaintiff in error can not relieve itself of responsibility upon the ground that it acted merely as an agent for its customers in these unlawful transactions.

See also *Central Stock Exchange* v. *Board of Trade*, 196 Ill. 396; *Weare Commission Co.* v. *People*, 111 Ill. App. 116; *Dickinson* v. *Board of Trade*, 114 Ill. App. 295.

In *Christie Grain & Stock Co.* v. *Board of Trade of Chicago*, 125 Fed. Rep. 161, 168, the United States Circuit Court of Appeals for the Eighth Circuit, speaking through District Judge Shiras (Circuit Judges Sanborn and Van Devanter concurring), said:

> It is thus proven beyond all reasonable question that the Chicago Board of Trade maintains in the building owned by it in the city of Chicago a place known as the Exchange Hall, wherein the members of the board, acting for themselves, and also as brokers for outside parties, engage in making and carrying through deals in grain and provisions, in which it is not intended to make a future delivery of the article nominally dealt in, but which are to be settled by the payment of money only according to the fluctuations of the market and which are in all essentials gambling transactions.

the Chief Justice saying, "Our decision, * * * involving the constitutional validity of the Child Labor Tax Law, *completely covers this case*" (*Hill* v. *Wallace*, 259 U. S. 44).

While this court held that the employment of children in factories had no such relation to interstate commerce as to bring it within the Federal regulatory power, it held contemporaneously that commission merchants and traders, engaged in purchases and sales, identically as in the instant case (there are 1,600 members, Tr. 4), constituted a part of the current of commerce which was subject to regulation. Congress in enacting the Grain Futures Act followed the Packers and Stockyards Act and the decision of this court sustaining the same (*Stafford* v. *Wallace*, 258 U. S. 495). The argument of the appellees will be built along the same lines.

In *Otis* v. *Parker*, 187 U. S. 606, 607, 609, it was held that the State had the power to condemn contracts for sales of shares on margins, or to be delivered at a future day. In sustaining the validity of the following provision of the constitution of California—

> All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction,

this court, speaking through Mr. Justice Holmes, said:

> Even if the provision before us should seem to us not to have been justified by the circum-

stances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." (*Booth* v. *Illinois*, 184 U. S. 425, 429.) No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized States. (See *Ballock* v. *State*, 73 Maryland 1.)

We can not say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we

say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price, he gets the purchased article, whatever its worth may turn out to be. But if he buys stock on margin, he may put all his property into the venture, and, being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. (*Cashman* v. *Root*, 89 California, 373, 382, 383.) If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in *Booth* v. *Illinois* (184 U. S. 425, 431), we are unwilling to declare the judgment to have been wholly without foundation.

II.

ASSIGNMENTS OF ERROR.

Generally speaking the 17 assignments of error are to the effect that the Grain Futures Act is unconstitutional and void in that—

First. It restricts the use of the mails.

Second. It seeks to prohibit the transmission by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States.

Third. It seeks to regulate commerce which is wholly intrastate and the act is not within the power of Congress to regulate interstate commerce.

Fourth. It denies to accused persons the right of trial for crime in courts created by law and presided over by judges holding office during good behavior; denies to accused persons the right of trial by jury and the right to be confronted with the witnesses against them; and that the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General constitute a commission for the trial of such persons for such crimes.

Fifth. It compels members of boards of trade and their customers to furnish evidence which may be used against them in a criminal case, and authorizes unreasonable searches respecting books and papers to be used in criminal proceedings against the owners of such books and papers.

Sixth. It deprives the members of boards of trade of the exclusive use of their private property resulting in the impairment thereof; and by forcing representatives of farmers' cooperative associations into membership, takes the private property of such boards of trade and their members for public use without just compensation.

III.

THE GRAIN FUTURES ACT.

The act is entitled "An act for the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes."

The act makes it unlawful (1) for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication, any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade; or (2) for any person to make or execute such contract of sale, which is or may be used for (*a*) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (*b*) determining the price basis of any such transaction in interstate commerce, or (*c*) delivering grain sold, shipped or received in interstate commerce for fulfillment thereof. The act excepts sales made (*a*) by the owner or grower of the actual grain, the owner or renter of the land on which it is to be grown, or an association of such

owners, growers, or renters; and (*b*) by or through a member of a board of trade designated by the Secretary of Agriculture as "contract market."

The penal provisions apply to such prohibited use of the mails and of the agencies and instrumentalities of interstate commerce; the failure to keep required memoranda; knowingly or carelessly delivering for transmission through the mails or in interstate commerce false, misleading, or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.

In *Stafford* v. *Wallace*, 258 U. S. 495, Mr. Chief Justice Taft, speaking for the court, said:

> We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees of Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.

The history and evil effects of trading in futures have become a substantial part of the literature of practically every branch of the Government.[2]

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[2] President Wilson's communication, Feb. 7, 1917, to Federal Trade Commission, p. 315, Report, Federal Trade Commission, Sept. 15, 1920, Vol. I, Country Grain Marketing.

Report, Senate Committee on Agriculture and Forestry, July 8, 1921, Sen. Rep. 212, 67th Cong., 1st sess.; id., Aug. 23, 1922, Sen. Rep. 871, 67th Cong., 2d sess.; Report, House Committee on Agriculture, May 4, 1921, House Rep., 44, 67th Cong., 1st sess.

Statement, Senator Capper, explaining Senate Report, Aug. 9, 1921, Cong. Rec., Vol. 61, pp. 4760–4769, 67th Cong., 1st sess.

Annual Report Chicago Board of Trade, 1921, Report of Joseph P. Griffin, president, Chicago Board of Trade, Jan. 10, 1922, pp. 19–21.

Testimony, Joseph P. Griffin, Hearings, Future Trading Act, before the Committee on Agriculture, House of Representatives, 67th Cong., 1st sess., Series C, p. 159.

Testimony, President Wells, Minneapolis Chamber of Commerce, id., pp. 67–68, 85–91.

House resolution No. 424, 63d Cong., 2d sess.

Hearings on future trading before the Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 767–773.

Communication, Joseph P. Griffin, president, Chicago Board of Trade, to board of directors, Feb. 28, 1921, on the subject of public criticism of grain exchanges, p. 474, Hearings, Future Trading in Grain, Senate Committee on Agriculture and Forestry, 67th Cong., 1st sess.

Letter, Mr. Randall, of Messrs. Gill and Fisher, large exporter, future trading hearings, Committee on Agriculture, House of Representatives, p. 1007, 66th Cong., 3d sess., January-February, 1921.

Testimony, Hon. Henry S. Robbins, before Rules Committee, on House resolution No. 424, hearings on grain exchanges, U. S. Cong. 1914, p. 206.

Report, Senate Committee on the Judiciary, on Washburn "antioption bill." Senate Report No. 893, 62d Cong., 2d sess.

Statement of Senator Mitchell on Washburn "antioption bill," Cong. Rec., Vol. 23, Pt. VI, p. 5832.

Senate resolution No. 133, 67th Cong., 2d sess., directing Federal Trade Commission to investigate conditions affecting grain trade.

Testimony, Julius H. Barnes (now president United States Chamber of Commerce), future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., p. 839.

Letter, Julius H. Barnes to directors Chicago Board of Trade, May 13, 1922, grain futures hearings, Committee on Agriculture and Forestry, U. S. Senate, 67th Cong., 2d sess., p. 69, on H. R. 11843.

Testimony, Mr. Gates, former president Chicago Board of Trade, future trading hearings, Committee on Agriculture and Forestry, United States Senate, 67th Cong., 1st sess., p. 331, on H. R. 5676.

The act clearly defines the interstate commerce to which it applies. That the Grain Futures Act was modeled on the Packers and Stockyards Act is readily demonstrable from a comparison in parallel columns of section 2 of each act.

THE GRAIN FUTURES ACT.	PACKERS AND STOCKYARDS ACT, 1921.
SEC. 2. (a) For the purposes of this act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale or cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorpo-	SEC. 2. (a) When used in this act— (1) The term "person" includes individuals, partnerships, corporations, and associations; (2) The term "Secretary" means the Secretary of Agriculture; (3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible; (4) The term "live stock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead; (5) The term "live-stock products" means all products and by-products (other than meats and meat food products) of the slaughtering

Testimony, Joseph P. Griffin, president Chicago Board of Trade, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 671-672.

Statement, Hon. Herbert W. Hoover, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 895, 896, 900, 911, 913, 919.

Statement, Julius H. Barnes, id., pp. 856, 857, 863, 865.

See also future trading hearings, Committee on Agriculture and Forestry, United States Senate, pp. 75, 80, 84, and 88, on H. R. 5676.

Statement, Clifford Thorne, general counsel American Farm Bureau Federation and general counsel Farmers National Grain Dealers Association, future trading hearings, pp. 973, 974, House Committee on Agriculture, 66th Cong., 3d sess.

Statement, Frederic B. Wells, of F. H. Peavey & Co., id., 957.

Statement, Joseph P. Griffin, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 671, 672.

Federal Trade Commission Report on Grain Trade, Vol. V, p. 29; same, Vol. V, pp. 183-185, 242, 253, 256; id., Report on Wheat Prices for the 1920 Crop, pp. 8 (13), 43, 60.

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rated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia.

(b) For the purposes of this act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the *grain trade* whereby *grain and grain products and by-products thereof* are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for *manufacture* within the State and the shipment outside the State of the products resulting from such *manufacture*. Articles normally in such current of commerce shall not be considered out of such *commerce* through resort being had to any means or device intended to remove transactions in respect thereand meat-packing industry derived in whole or in part from live stock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession, or the District of Columbia.

(b) For the purpose of this act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the *live-stock and meat-packing industries*, whereby *live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs*, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for *slaughter of live stock* within the State and the shipment outside the State of the products resulting from such *slaughter*. Articles normally in such current of commerce shall not be considered out of such *current* through resort being had to any means or de-

to from the provisions of this act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

vice intended to remove transactions in respect thereto from the provisions of this act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States and foreign nation.

The machinery for the enforcement of the Grain Futures Act, though modeled on that provided for the enforcement of the Packers and Stockyards Act, is, for obvious reasons, much less elaborate.

Each act provides penalties for violation of its provisions and for judicial review of the official acts of the officers charged with the enforcement thereof. In the Packers and Stockyards Act the court review was made similar to that which prevailed for the judicial review of orders of the Interstate Commerce Commission. In the Grain Futures Act the court review was made similar to that which prevailed for the judicial review of orders of the Federal Trade Commission. Under the Packers and Stockyards Act, market agencies must register with the Secretary of Agriculture under such rules and regulations as he may prescribe. Under the Grain Futures Act, any board of trade may secure a designation as a "contract market," after complying with, and carrying out, certain conditions and requirements prescribed by that act.

Section 5 of the Grain Futures Act contains the rules and regulations imposed upon an exchange for designation. The first is merely a classification and is inclusive of all of the leading grain futures exchanges of the United States; the others are (*b*) the keeping

of memoranda of all transactions in grain, whether cash or futures, as directed by the Secretary of Agriculture; (*c*) the prevention of the dissemination by the exchange, or any of its members, of false, misleading, or inaccurate reports concerning crop or market information, or conditions that affect or tend to affect the price of commodities; (*d*) the prevention of manipulation of prices, or the cornering of grain by the dealers or operators upon the exchange; (*e*) discontinuance of the practice of discriminating against cooperative associations of producers; (*f*) the execution of orders and decisions of the special tribunal created by section 6.

The bill was filed by the Chicago Board of Trade, a corporation organized February 18, 1859, under special charter granted by the State of Illinois. It seeks judicial adjudication that the Grain Futures Act is unconstitutional and void, and an injunction is prayed against the United States attorney, the Secretary of Agriculture, and the postmaster at Chicago from enforcing the provisions of the act. The substratum of the case is, and the argument is emphasized in brief, that the defendants in the bill are, by reason of the decree of this court declaring unconstitutional the Future Trading Act (*Hill* v. *Wallace*, 259 U. S. 44), "and the facts hereinabove stated (in the bill), estopped to claim or assert in this suit that said future trading is interstate commerce or is not intrastate commerce or that Congress had, under the power conferred upon it to regulate interstate and

foreign commerce, power to enact any of sections 4, 5, 6, 7, 8, and 9 of said Grain Futures Act." (Tr. 17.)

In view of the well-known elementary principle that the court will consider the act in its entirety, it is significant that the distinguished counsel does not specifically assail the power of Congress to enact sections 2 and 3 of the Grain Futures Act.

So convinced is the learned counsel that the instant case is *on all fours* with *Hill* v. *Wallace*, that in drafting the bill he incorporated *in haec verba* the first 14 paragraphs of the bill drafted by him in *Hill* v. *Wallace;* thus, "and said bill contains the same allegations as are contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of this bill. (Tr. 14.)

In *Employers' Liability cases*, 207 U. S. 463, 504, this court adjudged the statute as unconstitutional and void because it embraced both subjects within and subjects beyond the authority of Congress to regulate commerce and the two were so interblended in the statute that they were incapable of separation.

In *Second Employers' Liability cases*, 223 U. S. 1, this court sustained the new statute enacted in the light of the previous decision. In his brief in the second case the late Solicitor General Lloyd W. Bowers, writing of the previous decision, said: (223 U. S. 25) * * * "while what was then said in the opinion of the court concerning the authority of Congress to regulate the liability to an interstate employee was not logically vital to the de-

cision, nevertheless the utterance was made after full discussion of the very question at the bar, after solemn consideration of the question by the court, and in a deliberate purpose of preventing misconception by Congress of the actual and limited scope of the exact decision, with the result that Congress should not mistakenly believe itself incapable of enacting a new statute affecting interstate employees alone."

Noteworthy is it also that in the instant case, as in the Packers and Stockyards Act, the Congress did not leave to allegations, issues, proofs, and judicial determination, in the first instance, the question of what constitutes interstate commerce under the Grain Futures Act; but the Congress reenacted section 2 of the Packers and Stockyards Act and specifically included the "individuals, associations, partnerships, corporations, and trusts" and their "transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as futures" as a part of the "current of commerce" for all practical purposes as if both parties and their transactions had been specifically listed therein.

The question is one of constitutional law, and is not whether these parties and their transactions are included within the Grain Futures Act by judicial interpretation, but whether the Congress had the power to designate them and their transactions as a part of the "current of commerce" and as such subject to regulation.

Hill v. *Wallace* is by no means an adjudication that the Grain Futures Act is unconstitutional. On the contrary it decidedly sustains the Grain Futures Act. Concerning the Future Trading Act, Mr. Chief Justice Taft, speaking for the court, said:

> There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the board of trade in the city of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. *Looked at in this aspect* and without any limitation of the application of the tax to interstate commerce, *or to that which Congress may deem from evidence before it to be an obstruction to interstate commerce*, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. *It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.*
>
> * * * * *

It follows that sales for future delivery on the board of trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, *from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. United States* v. *Ferger*, 250 U. S. 19. It was upon this principle that in *Stafford et al.* v. *Wallace et al.* (258 U. S. 495) we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, *because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.*

So, too, in *United States* v. *Patten*, 226 U. S. 525, it was held that though this court, as we have seen, had decided in the *Ware & Leland case*, 209 U. S. 405, that mere contracts for sales of cotton for future delivery which did not oblige interstate shipments were not interstate commerce, an indictment charging the defendants with having cornered the whole cotton market of the United States by excessive purchases of cotton for future delivery and thus conspired to restrain, obstruct, and monopolize interstate commerce in cotton, was sustained under the first and second sec-

> tions of the Sherman Antitrust Law. This case, like *Stafford* v. *Wallace*, followed the principles of *Swift & Co.* v. *The United States*, 196 U. S. 375. But *the form and limitations of the act* before us form no such basis as those cases presented for Federal jurisdiction and the exercise of the power to protect interstate commerce. (*Italics ours.*)

The inevitable implication of this language was to authorize the enactment of the Grain Futures Act, which, in practically all of its beneficent aspects justified the exercise of the congressional power far beyond anything contained in the Packers and Stockyards Act.

The argument might well rest here. Significant, however, is the singular fact that the distinguished counsel for the appellants, in brief and appendix of over 150 printed pages, has cited and discussed over 100 cases and completely ignored the Packers and Stockyards Act and *Stafford* v. *Wallace*, 258 U. S. 495. His vast knowledge of the subject, his loyalty to his client, and his prodigious and successful labors in its behalf for more than 25 years, all taught him better than any man that the Grain Futures Act was modeled after the Packers and Stockyards Act; and that after the decision of this court in *Stafford* v. *Wallace*, sustaining that act to the limit, the Congress had accepted as its unmistakable constitutional authority for the enactment of the Grain Futures Act the previous adjudication of a coordinate branch of the Government.

IV.

THE "CURRENT OF COMMERCE."

The Grain Futures Act itself adjudges that the parties and their transactions embraced within the statute "shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another," etc.

The bill does not assail specifically these provisions of the act. On the contrary, the case sought to be made by the appellants appears to accept, certainly it does not directly challenge, this enactment of the Congress. Nor could such a challenge be considered in the absence of specific allegation, with ample proof in support of the same, that the enactment was contrary to the fact that the trading was in grain which never came into and never went out of the State of Illinois. This court has repeatedly taken judicial notice of the great Chicago grain market. Of course Congress could do likewise.

The bill alleges (Tr. 8):

> Many of said members, including some of the co-complainants, daily engage, either as principals or as agents, in the making in said Exchange Hall of contracts with other members of the exchange for the purchase and sale of grain for future delivery, said contracts providing that the seller therein shall deliver in Chicago the grain covered by the contract

upon any day of the named month that he shall select. That more than 75 per cent of the volume of all the trading in said Exchange Hall consists of such trading for future delivery. Such contracts relate almost wholly to wheat, corn, and oats, and the volume of such trading is so large that said exchange has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a "pit," where its members may conveniently, and do daily, gather and make such future contracts with each other by open viva voce bidding; * * *.

The bill further alleges (Tr. 10):

That at the present time there are 12 warehouses, with an aggregate capacity of 12,950,000 bushels, whose proprietors have received under said statute licenses to conduct Class "A" warehouses, * * *. That in this trading for future delivery in the exchange room of said exchange during any year many millions of bushels of wheat, corn, and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases, etc.

The bill further alleges (Tr. 12):

That there is produced yearly in the United States more wheat, corn, and oats than is consumed within said United States; that from the year 1899 to the year 1913, both inclusive,

the number of barrels of wheat flour exported in any year, as disclosed by the statistics of the United States Department of Commerce, was not less than 8,826,000 barrels, and in one of said years the number of barrels exported was 19,716,000; and that during one of said years there was exported 154,856,000 bushels of wheat, and except in one of said years (when there was a failure of the crops) there has been not one of said years in which the amount of wheat exported did not exceed 23,000,000 bushels; and that during one of said years there was exported over 209,000,000 bushels of corn, and in none of said years was there exported less than 26,000,000 bushels of corn, and that yearly exports of oats during said years range from over 46,000,000 bushels to 1,000,000 bushels.

* * * * *

That approximately six-sevenths of all the trading in grains for future delivery upon the exchanges of the United States takes place in the Exchange Hall of said Chicago Exchange, but that other commercial exchanges which furnish to their members and their customers like facilities for making contracts for future delivery, are located and maintained at Minneapolis, Duluth, Kansas City, St. Louis, and Toledo, Ohio; that the members of all of such other exchanges are competing with the members of said Chicago Exchange for the business of making contracts for future delivery for customers and the purchase of cash grain at country points.

The bill further alleges (Tr. 13):

> That on the contrary the purchase and sale of grain for future delivery upon said exchange and said other boards of trade is a distinct benefit to all producers and consumers, and to persons engaged in commerce in grain, in that it enables owners of grain to protect themselves against price fluctuations by the making of "hedging" contracts upon such exchanges.

The Committee on Agriculture and Forestry of the Senate, on August 23, 1922, submitted, by Senator Capper, its report on "Regulating Transactions on Grain-Future Exchanges."

On page 7 of the report it is said:

> The definition of interstate commerce is identical with the definition in the Packers and Stockyards Act of 1921, except for such changes as are necessary to make it applicable to grain. This definition is based upon the decision of the court in the case of *United States* v. *Swift* (196 U. S. 396) and was upheld in *Stafford* v. *Wallace*.

The committee report quotes from *Stafford* v. *Wallace* as follows:

> The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows and the transactions which

> occur therein are only incident to this current from the West to the East and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

In *New York & Chicago Grain & Stock Exchange* v. *Chicago Board of Trade*, 127 Ill. 153, 156, 161, 162, 163, the Supreme Court of Illinois said:

> It has been said, and with much show of reason, that the floors of this Exchange Hall stand in the gateway of commerce. * * *
>
> Four-fifths of the grain and provisions produced in the States and Territories of the

Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs, and meats for the extensive territory that is tributary to Chicago, and seriously affects, and to a considerable extent controls, the values of the necessaries of life throughout the United States and the civilized world.

* * * * *

For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world. The great power and influence which the board possesses in dictating market values are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business—though in form, and as between the members, the mere private and individual dealings of such members—is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal.

* * * * *

In this way the business of the country in buying and selling agricultural products has been brought under the control of the market

values for such products as fixed and determined on the board of trade, and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports, inaugurated, and for years persisted in, by the board of trade and the telegraph companies.

* * * * *

Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest.

In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 245, 247, this court said:

The plaintiff was incorporated by special charter of the State of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain & Stock Company, that it then managed its chamber of commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the Wheat Pit, the Corn Pit, and the

> Provision Pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf. * * *
>
> As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world.

In *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 235, this court, speaking through Mr. Justice Brandeis, said:

> Chicago is the leading grain market in the world. Its board of trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade* v. *Christie Grain & Stock Co.* (198 U. S. 236). Its 1,600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products, and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (*a*) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (*b*) Future sales; that is, agreements for delivery later in the current or in some future month. (*c*) Sales "to ar-

> rive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the board from 9.30 a. m. to 1.15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the board.

In *United States* v. *Ferger*, 250 U. S. 199, 203, this court, speaking through Mr. Chief Justice White, said:

> * * * it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it.

> We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstruction to interstate commerce (*In Re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

In *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 272, this court, speaking through Mr. Justice Holmes, said:

> So far as the oil that it calls for goes out of the State with the general current it seems to us not to be distinguishable from the rest admitted to move in interstate commerce. No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far.
>
> * * * * *
>
> As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid "must not in its practical effect and operation burden interstate commerce." It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the begin-

> ning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed.

In *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 281, this court, speaking through Mr. Justice Holmes, said:

> In short, the great body of the gas starts for points outside the State and goes to them. That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as

> contemplated from the beginning beyond the State line. *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 108. *United States* v. *Reading Co.*, 226 U. S. 324, 367. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 113. We have mentioned only such facts as are sufficient for our decision, and have not noticed other objections urged against the law. What we have stated seems to us enough to condemn it as applied to this case.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291, 292, this court, citing the two foregoing cases, and speaking through Mr. Justice Van Devanter, said:

> The commerce clause of the Constitution, Article I, section 8, clause 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. (*Brown* v. *Maryland*, 12 Wheat. 419, 446–447; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519.) On the same principle, where goods are purchased in one State for transportation to another the commerce in-

cludes the purchase quite as much as it does the transportation. (*American Express Co.* v. *Iowa*, 196 U. S. 133, 143.) This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri* (91 U. S. 275, 280): "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." In *Kidd* v. *Pearson* (128 U. S. 1, 20) it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In *United States* v. *E. C. Knight Co.* (156 U. S. 1, 13) "contracts to buy, sell, or exchange goods to be transported among the several States" were declared "part of interstate trade or commerce." And in *Addyston Pipe & Steel Co.* v. *United States* (175 U. S. 211, 241) the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was inci-

dental to buying or selling it was not material whether it came first or last.

* * * * *

The State court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the State of its origin might be halted by the shipper in the exercise of the right of stoppage *in transitu* before it got out of that State. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. See *United Fuel Gas Co.* v. *Hallanan, supra.*

In *Lemke, Attorney General,* v. *Farmers Grain Co.,* 258 U. S. 50, 53, Mr. Justice Day, citing *Swift & Co.* v. *United States,* and the three last foregoing cases, said:

> The record discloses that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by com-

plainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.

That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle, *Dahnke-Walker Milling Com-*

pany v. *Bondurant*, 257 U. S. 282. * * * Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that

practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co.* v. *United States*, 196 U. S. 375; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; and *United Fuel Gas Company* v. *Hallanan*, 257 U. S. 277.

V.

THE SHERMAN ANTITRUST ACT.

In the enforcement of the Sherman Antitrust Act the jurisdiction of the courts has never been defeated on the ground that transactions such as those conducted by the Chicago Board of Trade were not transactions in interstate commerce.

Such practices as "[redacted]" "running a corner," "ringing up," and "puts" and "calls" have become notoriously prejudicial to the public welfare. In some instances certain of those practices have been made the basis of indictments under the criminal laws.

In *United States* v. *Patten*, 226 U. S. 539, "running a corner" is defined as follows:

> Upon the second argument the defendants contended, and counsel for the Government expressly conceded, that "running a corner" consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, "one of the important features of which," to use the language of the Government's brief, "is the purchase for future

delivery, coupled with a withholding from sale for a limited time;" and as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 246, 247, "ringing up" is defined as follows:

> It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time against contracts to sell a like amount at the same time, and paying the difference of price in cash at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B 5,000 bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase on simply paying the difference in price.

In *Pearce* v. *Foote*, 113 Ill. 228, 234, "puts" and "calls" are defined as follows:

> A "put" is defined to be the "privilege of delivering or not delivering" the thing sold, and a "call" is defined to be the "privilege of calling for or not calling for" the thing bought. "Optional contracts," in this sense, are usually settled by adjusting market values, as the party having the "option" may elect. It is simply a mode adopted for speculating in differences in market values of grain or other commodities.

The bill alleges (Tr. 13):

> That, while in former times, when there were only a few participants in said future trading, who had large capital and credit, so-called "corners" in grain did occur at rare intervals, said exchange has for many years maintained and enforced rules (which are set out in this bill) to prevent the running of such corners; and that by reason of such rules and their enforcement—and perhaps the Sherman Antitrust Act—no corners have for the last 15 years occurred in the future trading in grain on said exchange, or said other boards of trade; and that no member of said exchange or of any of said other boards of trade, has ever been indicted or convicted under any of the statutes, State or Federal, which prohibit the running of "corners."

The counsel argues (Br. 20):

> If this country exported *all* the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than

> hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains, and this court has determined in *U. S.* v. *Patten*, 226 U. S. 525, that a conspiracy of persons to run a "corner" and thereby *increase* prices is so harmful to the public as to be within the Sherman Antitrust Act. * * * But "corners" in the grain market are "a thing of the past." The amount of capital and credit required, the probability of failure and consequent enormous losses, rules of the exchange prohibiting and penalizing "corners," and the decision of this court in *U. S.* v. *Patten*, 226 U. S. 525, have caused "corners" to be found only in past history.

In *United Mine Workers* v. *Coronado Coal Co.*, No. 31, Supreme Court, October term, 1921, decided June 5, 1922, this court, speaking through Mr. Chief Justice Taft, said:

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.

Taylor, in his History of the Chicago Board of Trade, Volume II, pages 991–1260, gives an interesting account of the details of many corners during the years 1900 to 1917, when the last edition of his book was published, including the corn corner in 1901; the corn corner in 1902; the oats corner in 1902; the wheat

corner in 1902; the oats corner in 1903; the wheat deal in 1903; the corn corner in 1905; the wheat corner in 1905; the wheat corner in 1906; the wheat corner in 1907; the wheat deal in 1907; the wheat, oats, and corn deals in 1908; the wheat corner in 1909; the wheat deal in 1911, the wheat deal in 1912, and the corn speculation in 1913.

The suggestion that these corners and deals are not now being manipulated because of the Sherman Antitrust Act would seem to be a confession that practices on the Chicago Board of Trade have a very direct relation to interstate commerce. To argue that these corners and deals do not recur because of the impending danger of criminal indictment, as in *United States* v. *Patten*, is an argument in favor of the Grain Futures Act rather than against it. The allegation and argument should not prevail that because of fear of criminal indictment offenses are not committed against the interstate commerce laws, hence there is no interstate commerce to regulate.

In *Stafford* v. *Wallace* this court made reference to certain criminal prosecutions under the Sherman Antitrust Act against illegal practices on the part of those engaged in the purchase and sale of live stock in the Union Stockyards. The manipulation of these corners and deals, and the fear of criminal indictment with respect thereto, might well be embraced within what this court referred to as the "special evidence" which the Congress had the right to consider.

In *United States* v. *Patten*, 226 U. S. 525, 540, 541, 542, 543, 544, this court held that "running a corner" on cotton was a conspiracy in restraint of trade and commerce and punishable by indictment under the Sherman Antitrust Act. In delivering the opinion Mr. Justice Van Devanter, speaking for this court, said:

> We come, then, to the question, whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of section 1 of the antitrust act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." * * *
>
> Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. (Citing cases.)
>
> * * * * *
>
> It well may be that running a corner tends for a time to stimulate competition; but this

does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success

depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the antitrust act is designed to prevent. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396–400; *Loewe* v. *Lawlor*, 208 U. S. 274; *Standard Oil Co.* v. *United States*, 221 U. S. 1, *United States* v. *American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Reading Co.*, 226 U. S. 324, 370.

That these practices have such a direct relation to interstate commerce as that they may be made the basis of suits under the Sherman Antitrust Act appears never to have been doubted.

In *Chicago Board of Trade* v. *United States*, 246 U. S. 231, as shown by the transcript in that case, the Government filed a petition in the district court against the Chicago Board of Trade, its officers and directors, alleging that, when carried into force and effect by the members thereof, the following rule was in violation of the Sherman Antitrust Act, viz:

> SEC. 33. A. The board of directors is hereby empowered to establish a public "call" for corn, oats, wheat, and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.
>
> B. Contracts may be made on the "call" only in such articles and upon such terms as have been approved by the "call" committee.
>
> C. The "call" shall be under the control and management of a committee consisting of five members appointed by the president with the approval of the board of directors.
>
> D. Final bids on the "call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in, and that with such market all making of new prices by members of this association shall cease until the next business day.

> E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct, and upon conviction such member shall be suspended from the privileges of the association for such time as the board of directors may elect.

In answering, the defendants, by the same distinguished counsel who appears in the instant case, made no denial whatever that the transactions were in interstate commerce. On the contrary, the counsel left unchallenged the jurisdiction of the district court and came at once to the merits of the case. In his brief filed in this court on the appeal in that case he made certain verbal criticisms of the form of the injunction decree because it "regulates intrastate trade." But that was not in any sense a challenge of the jurisdiction of the court. Throughout the brief in that case he appears to have assumed that the transactions were in interstate commerce, as he rested his case on the argument that the persons who conducted the transactions were not engaged in a combination and conspiracy in restraint of trade and commerce in violation of the Sherman Antitrust Act.

The opinion of this court assumes that the transactions were in interstate commerce and that the parties were engaged in interstate commerce who conducted them. There is no suggestion whatever to the contrary. If the transactions were not in interstate commerce and the parties were not en-

gaged in interstate commerce who were conducting them, the distinguished counsel for appellants in that case who also represents the appellants in the instant case would quickly have made the point.

Moreover, that case has been cited in subsequent cases arising under the Clayton Act but never on the proposition that the transactions referred to therein were not in interstate commerce. (*Standard Fashion Co.* v. *McGrane Houston Co.*, 259 Fed. Rep. 793, 798.)

An exchange which deals in the purchase and sale of more grain than the whole world either produces or consumes must have a very real relation to interstate and foreign commerce.

VI.

TRADING IN FUTURES ON THE CHICAGO GRAIN MARKET SO VITALLY AFFECTS THE PUBLIC INTEREST AS TO PUT IT BEYOND THE POWER OF THE CHICAGO BOARD OF TRADE TO CLAIM THAT IT IS CONDUCTING ONLY A MERE PRIVATE BUSINESS.

The bill alleges (Tr. 18):

> It (the act) seeks to deprive said exchange and its members of their property without due process of law in violation of the fifth amendment to the Constitution, in that, by compelling the admission to membership in said exchange of representatives of cooperative associations of producers, it deprives such exchange and its members of their exclusive right to use their private property, and thereby it will impair the value of said property and all memberships in said exchange.

> It violates the fifth amendment to said Constitution in that it attempts, by forcing representatives of farmers' cooperative associations into membership of said exchange, to take the private property of said exchange and its members for public use without just compensation therefor.

The alleged property right involved already has been devoted to a public use. A practical monopolization of essential terminal grain marketing facilities exists when it appears that a combination controlling them arbitrarily and unreasonably excludes outsiders from access to them, or imposes upon others unnecessarily onerous tolls and conditions for the use and employment of such facilities. If the Chicago Board of Trade, having acquired an economically effective monopoly over the marketing machinery of the great bulk of the world's supply of grain, excludes other grain purchasers and dealers from membership, there results a trade monopoly whose effect, regardless of the intent, would burden and obstruct the movement of grain in interstate commerce.

In *Anderson* v. *United States*, 171 U. S. 604, 615, 618, 619, it was sought under the Sherman Antitrust Act to dissolve a traders' live-stock exchange and to enjoin the members from entering into or continuing any sort of combination to deprive any person engaged in shipping, selling, buying, and handling live stock for sale at the Kansas City Stockyards of free access to the market; it was shown that the traders' ex-

change, by rule, practically prohibited any of its members from doing business with any other dealer who was not a member of the exchange, or with any commission man who did business with such nonmember. This court said:

> In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be considered they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act. * * *.
>
> *All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof.* * * *
>
> The agreement lacks, too, every ingredient of a monopoly. *Everyone can become a member of the association.* (Italics ours.)

Ordinarily grain dealers may combine for the purpose of providing and controlling equipment and facilities for the marketing of grain for their common and exclusive use. In such cases other dealers may be admitted upon terms or excluded altogether. This arbitrary discretion is not absolute. *State* v. *Stock Exchange*, 211 Mo. 181, 197–198; 109 S. W. 675. It is surrendered when the property is devoted to a public use and the Sherman Antitrust Act takes it away when it is shown that its exercise has the effect of restraining, burdening, or monopolizing interstate commerce.

In *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411, this court said:

> The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation * * *. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation" * * *. It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and can not be applied, though modern economic conditions may make necessary or beneficial its application. In other words, to say that Government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than Government possesses to-day.

In *Munn* v. *Illinois*, 94 U. S. 113, 126, 130, this court held that a business may so become affected with the public interest as to subject it to legislative control. In delivering the opinion this court said:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use * * *. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation.

In *House* v. *Mays*, 219 U.S. 270, this court approved the decision of the Supreme Court of Missouri which sustained a statute prohibiting any deduction from the actual weight of grain pursuant to a rule of a board of trade. These cases establish the proposition that the by-laws and rules of exchanges are subject to legislative control whenever it is shown that they violate the law or are contrary to public policy. This court said:

> The Kansas City Board of Trade * * * in the management of its affairs has such close and constant relations to the general public that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the State necessary or needful to protect the people against unfair practices that may likely occur from time to time * * *. If such State regulations are not unreasonable, that is, not simply arbitrary, nor beyond the necessities of the case, they are not forbidden by the Constitution of the United States.

In *Grisim* v. *South St. Paul Live Stock Exchange*, 188 Northwestern, 729, 730, 731, the Supreme Court of Minnesota (citing *Stafford* v. *Wallace*) sustained a State statute declaring void a by-law of a live-stock exchange prohibiting members from trading with nonmembers on the ground that such by-law was contrary to public policy. The court held that the legislature, in the exercise of its police power, may annul by-laws regulating the business conduct of the members of an exchange without impairing

the contract obligations of the exchange or its members; that a statute annulling such by-laws does not take members' property without due process of law, and that—

> an association of such commission men may also be required to observe such reasonable regulations as the State sees fit to impose in the exercise of its police powers. * * *.
>
> Membership rights and privileges may be property, but they are property which is held subject to police power of the State so to regulate and control its use as to secure the public welfare. Rights of property, like other social and conventional rights, are subject to such reasonable restraints and regulations as the legislature may think necessary and expedient, provided always that it does not transcend the governing and controlling power vested in it by the Constitution. In short, the subordination of property rights to the just exercise of the police power is as complete as it is to the proper exercise of the taxing power. (Citing numerous opinions of this court.)

The Grain Futures Act (with respect to cooperative associations) provides:

> When the governing board thereof does not exclude from membership in, and all privileges on, such board of trade, any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as

> are or may be imposed lawfully on other members of such board: Provided, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association. (Sec. 5 (e).)

This section is sustained by the foregoing cases and merely prohibits discrimination with respect to membership on the part of an exchange which has been shown to be affected with a public interest. The section also forbids the making or the interpretation of a rule by the exchange which is unreasonable and arbitrary and is unfairly employed for the purpose of effecting an unreasonable discrimination against farmers who desire in a collective way to market their grain in Chicago without paying the customary tolls required of nonmembers by the commission members of the exchange.

The present rules of the Chicago Board of Trade, as construed by it, compel an association of producers, as a condition precedent to membership, to pretend to engage in a commission business, when in fact it is their intent and purpose to market their grain in Chicago on an actual cost basis. Such rules permit corporations to have the benefits of membership in the exchange through stockholder-officer representatives. As the exchange applies these rules, large corporations having an unlimited number of stockholders, such as the great packers, millers, elevators, and other grain dealers, may acquire the right to

use the exchange facilities for dealing in cash grain and futures without paying commission for such services or pretending to conduct a commission business, while a group of farmers is excluded from such membership unless it agrees to charge its members the prevailing commission rate. The exchange, through its rules, extends an opportunity to every combination of persons engaged in the grain business to employ its facilities without paying commissions, except an association of producers. This discrimination is based upon the erroneous conception that the commission members of the exchange have the right to force farmers desiring to market their grain at the terminals in a collective way to employ the commission members as their agents and that in order to enforce this assumed right the exchange should withhold membership from the farmers.

The practical effect of this policy of exclusion on the part of the exchange makes it difficult, if not impossible, for producers successfully to market their grain in Chicago without the intervention and employment of some commission member of the exchange. Therefore, membership in the exchange upon reasonable terms is a matter in which the public is deeply concerned and consequently is subject to public regulation. In Section 5 (e) of the Grain Futures Act, Congress has indicated a desire to eliminate these unfair practices on the part of the exchanges.

It is submitted that a person or association of persons desiring to market their grain in Chicago are confronted with substantially the same situation as that which met the railroad which sought to enter and pass through St. Louis.

In *United States* v. *Terminal Railroad Association*, 224 U. S. 383, 394, 395, 397, 398, 401, 404, 405, 410, it appeared that a combination of railroads had acquired control of practically all of the terminal facilities in St. Louis, which they operated on a cost basis and allowed other railroads entering St. Louis to use upon payment of specified tolls. The Government charged that this association was a monopoly and a combination in restraint of interstate trade and commerce. This court said:

> Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Antitrust Act? * * *
>
> The consequence to interstate commerce of this combination can not be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. * * *
>
> The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad having to pass through or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. * * *

"The other companies use the Terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." * * *

If the Terminal Company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. * * *

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. * * *

While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman Act. * * *

The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are (page 404) under compulsion to use the terminal system, and yet have no voice in its control. * * *

But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. * * *

This control and possession constitutes such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the East or West, as to

be both an illegal restraint and an attempt to monopolize. * * *

This court required that the Terminal Association should admit any existing or future railroad to joint ownership or control of the combined terminal property upon such just and reasonable terms as would admit such applicant upon the plane of equality with respect to benefits and burdens of the existing proprietary companies.

The Chicago Board of Trade has the same economic grip upon the marketing of grain there as the Terminal Association had upon the physical transportation system at St. Louis. The future trading facilities in Chicago are under absolute control of the Chicago Board of Trade. The peculiar and extraordinary situation which it occupies with respect to the handling of the great stream of interstate grain which flows through Chicago clearly justifies Congress in requiring the exchange to keep its doors open for the admission of otherwise eligible grain dealers on fair terms and in compelling it to refrain from unjust and arbitrary discrimination with respect to membership therein.

The admission of others with defined qualifications into membership of boards of trade or exchanges that all may trade upon the same basis under governmental regulation is not confiscatory of property.

The bill alleges that the Chicago Board of Trade now owns in fee real estate in the business district of Chicago upon which it has constructed a large building which provides it with an exchange room and

offices and also surplus space from which the exchange derives a substantial rental, and that a fair market value of such real estate and building, over and above a mortgage thereon, exceeds $2,000,000. (Tr. 5, Br. 67.)

It is argued that this property is just as much privately owned as is any office building or private residence, and that it is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes. (Br. 67.)

It is further argued that the method prescribed in the Grain Futures Act "is to furnish—at the meager salary which our governments pay those who serve them—a deputy of a high official, who is possessed of all the wisdom necessary to keep the markets at the proper price level" (Br. 49), and that "this trade thermostat is to run upon the superior wisdom of a single human mind. Instead of natural prices there is to be substituted man-made prices." It is further suggested that "this deputy might himself trade and thus become interested in the course of prices." (Br. 50.)

Here again the Grain Futures Act is not unlike the Packers and Stockyards Act. The argument that the transactions on these boards of trade and exchanges will disturb transactions as between private parties which are entirely separate and apart from the public interest can not be sustained. The authorities are against it.

VII.

THE PROHIBITED USE OF THE TELEGRAPH LINES AND THE MAILS FOR TRADING IN FUTURES EXCEPT UNDER THE TERMS AND CONDITIONS PRESCRIBED BY THE GRAIN FUTURES ACT IS A VALID EXERCISE OF CONGRESSIONAL POWER.

The court will not review the judgment of Congress that there are evils inherent in transactions involving future trading. *Otis* v. *Parker*, 186 U. S. 606, 609.

Section 4 of the Grain Futures Act provides:

> It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

The prohibited use of the mails to those engaged in transactions involving future trading except under the terms and conditions prescribed by the Grain Futures Act is amply sustained by repeated decisions of this court.

Telegraph companies are interstate carriers and subject to regulation as such. *Pensacola Telegraph Co.* v. *Western Union*, 96 U. S. 1. Section 1, act to regulate commerce, approved June 29, 1906 (36 Stat. 539, 544). Wireless and radio companies are also included, section 400, transportation act, 1920 (41 Stat. 456, 474, 475).

In *In Re Rapier*, 143 U. S. 110, 133, 134, 135, it was held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the United States and that under it Congress may designate what may be carried in the mails and what excluded; and that, in excluding various articles from the mails, the object of Congress was not to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals. By a broad and sweeping act the Congress sought to eliminate from the mails lottery tickets and all relevant advertisements, circulars, pamphlets, *et hoc genus omne*. In sustaining the act this court said:

> It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the

exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but can not do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and

what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In *Lottery Case*, 188 U. S. 321, 353, 354, 358, it was held that lottery tickets are subjects of traffic among those who chose to buy and sell them, and the carriage by independent carriers from one State to another is interstate commerce which Congress may prohibit under its power to regulate commerce. In

delivering the opinion of the court, Mr. Justice Harlan said:

> It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of commerce that may be regulated by Congress, we can not accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Ascuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery

tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. 963. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts excluding lottery tickets from the mails and prohibiting the importation of lottery matter from abroad, and to prohibit the causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred, from one State to another by any means or method. 15 Stat. 196; 17 Stat. 302; 19 Stat. 90; Rev. Stat. Sec. 3894; 26 Stat. 465; 28 Stat. 963.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

* * * * *

If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat

> favored in both National and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Sustaining the prohibited use of the channels of interstate commerce for the transportation of lottery tickets and absolutely excluding the same therefrom, the court cited the acts and cases sustaining the same relating to transportation of diseased live stock and intoxicating liquors.

In *Hoke* v. *United States*, 227 U. S. 308, 320, 321, 322, this court, speaking through Mr. Justice McKenna, said:

> Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States, and that such being the right, another can not be made guilty of the crime of inducing or assisting, or aiding in the exercise of it, and "that the

motive or intention of the passenger, either before beginning the journey or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. *United States* v. *Popper*, 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery case*, 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise, as in the instances stated and which finds further illustration in *Reid* v. *Colorado*, 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the States may control the immoralities of its citizens. Indeed, this is their chief insistence, and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the States to regulate the morals of their citizens and assert that it is in consequence an invasion of the reserved powers of the States. There is unquestionably a control in the States over the morals of their

citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States can not reach and over which Congress alone has power; and if such power be exerted to control what the States can not, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States. We have cited examples; others may be adduced. The Pure Food and Drugs Act (June 30, 1906, 34 Stat. 768, c. 3915) is a conspicuous instance. In all of the instances a clash of national legislation with the power of the States was urged, and in all rejected.

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people, and the power reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls.

In *Lewis Publishing Co.* v. *Morgan, Postmaster*, 229 U. S. 288, the case arose under the Federal power over the mails and in classifying first and second class mail matter. It was provided that a publication which did not show the names of its editors and publishers, stockholders and bondholders, the circulation, and which did not identify its editorial and reading matter from its advertisements would not be entitled to preferential rates. It was contended that this act was in effect a censorship of the press, and was intended to prevent anonymity in its printed contents. This court held that the classification was justifiable, and that in classifying mail matter it was and is in—

> the power of Congress "in the interest of the dissemination of current intelligence" to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers.

The provision that the Secretary of Agriculture may designate a board of trade or exchange as a contract market is not, in legal effect, unlike that contained in the Packers and Stockyards Act which authorizes him, from time to time, to ascertain, after such inquiry as he deems necessary, the "stockyards" and "market agencies" which come within

the definitions prescribed by that act and to give public notice thereof. That in legal effect the designation of a "contract market" under the Grain Futures Act, and the posting of notices that "stockyards" are "market agencies," and that either such designation or such posting may be revoked for cause, in accordance with the provisions of the respective acts, is a proposition which, in view of the decision in *Stafford* v. *Wallace*, needs no further discussion.

VIII.

CONCLUSION.

The so-called estoppel against Congress from enacting the Grain Futures Act and against the representatives of the Government from enforcing the same should not prevail.

The whole case of the appellants is foreclosed by the Packers and Stockyards Act and the decision of this court in *Stafford* v. *Wallace*.

To discuss the voluminous affidavits of the learned professors of the great universities, setting forth the advantages of trading in futures that the law of supply and demand may be regulated, would serve no useful purpose. Probably most of them have had no practical experience in the commerce in grains. In any event the theory of our Constitution is that the Congress of the United States is a better judge of the common welfare than all the learned faculties of our universities. The theory may be wrong but the people, whose destinies are affected, seem to be con-

tented with it, and this court will respect the judgment of Congress in a practical matter. However, as our learned opponent has appended to his brief an appendix containing the voluminous opinions of professors of the universities, the Government has, against their theories, printed in a similar separate brief in the nature of an appendix a statement by the Department of Agriculture on the practical workings of the Grain Exchanges and especially of the Chicago Board of Trade—and a grain of practice is worth an ounce of theory.

The decree of the District Court dismissing the bill of complaint should be affirmed.

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